

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
FLORENCE DIVISION

LORIA THOMAS,	)	C/A NO.: 4:94-78-22
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	<b>ORDER</b>
WAL-MART STORES, INC.,	)	
d/b/a Sam's Club, CORLEEN	)	
NORRIS, Supv. of Sam's Club	)	
& STEVEN FAYE, Receiving	)	
Manager of Sam's Club,	)	
	)	
Defendants.	)	
_____	)	

On January 11, 1994, Plaintiff filed this action alleging that Sam's Club (Defendant") fired Plaintiff because of her race in violation of 42 U.S.C. § 2000e ("Title VII") and 42 U.S.C. § 1981(a). This matter is before the court on the Report and Recommendation of the Magistrate Judge recommending summary judgment in favor of Defendant.<sup>1</sup> For the reasons discussed below, the court accepts the Magistrate Judge's recommendation and grants summary judgment in favor of Defendant.

**I. Statement of Facts**

On July 20, 1992, Britt T. Gardner, the manager of Sam's Club in Myrtle Beach, South Carolina, hired Plaintiff, a black female, as a part-time food demonstrator. The

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<sup>1</sup>Plaintiff never served the two individual Defendants. When a party is not served within 120 days after filing the complaint, Plaintiff must explain this failure in writing. Local Rule 7.02, DSC. Plaintiff informed counsel for Defendant that Plaintiff does not intend to serve these parties. Therefore, the court dismisses Plaintiff's causes of action as to the individual Defendants pursuant to Rule 4(m), Fed.R.Civ.P.

demo department demonstrates various food related items for Defendant's members.<sup>2</sup> One full-time demo department associate supervises the other demo department associates, who are all part-time associates.

In late December 1992, in anticipation of the business slow-down following the Christmas season, Sam's Club terminated a total of twelve part-time employees, including ten white employees and two black employees. Three employees from the demo department were terminated. Two of these employees were white and one employee was black. These three employees were terminated based on each employee's work performance relative to the other employees in the demo department. Plaintiff was the black employee terminated in the demo department.

Thereafter, in early January 1993, Sam's Club employee, Terri Byrd, a white female, was temporarily moved to the demo department. Byrd remained in the demo department until May 1993, due to an increased workload in that department. Thereafter, she was moved to the membership department.

Sam's Club asserts that the decision to terminate Plaintiff was not racially motivated, but was made as part of an overall reduction in the store work force after the 1992 Christmas season. In support of its position Sam's Club presented the following evidence.

In late December 1992, Gardner determined it was necessary to terminate a total of twelve part-time employees, including three from the demo department. Gardner asked

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<sup>2</sup>Sam's Club refers to its customers as "members" and its employees as "associates" and "partners."

each assistant manager to recommend employees under his or her supervision for termination, based on relative job performance. The assistant managers were not involved with each other's decisions about choosing employees for termination.

Steven Fay, the assistant manager in charge of the demo department, asked Colleen C. Norris<sup>3</sup>, the supervisor of the demo department, to review the performance of the demo department associates and recommend for termination those three associates with the poorest work performance. Norris recommended that Plaintiff, a black female, Laura Owen, a white female, and Martha Soller, a white female, be terminated. Norris believed, and Fay agreed, that these three associates performed poorly relative to the other demo department associates.

Specifically, with regard to Plaintiff, Fay had evaluated her on December 18, 1992. Her performance at the time was marginal and Fay gave her a warning, or “verbal coaching,” about her tardiness.

Fay recommended to Gardner, the store manager, that Plaintiff, Owen and Soller be terminated as part of the overall seasonal reduction in the store work force. Gardner reviewed and accepted Fay's and Norris' recommendations and included Plaintiff, Owen and Soller in the seasonal reduction. On Tuesday, December 29, 1992, Owen was terminated. On Wednesday, December 30, 1992, Soller was terminated. On Thursday, December 31, 1992, Plaintiff was terminated. Overall, as part of this seasonal reduction, Gardner terminated twelve part-time employees, including ten whites and two blacks.

Sometime after Plaintiff, Owen and Soller were terminated, Todd West, the

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<sup>3</sup>Both individual Defendants' names are misspelled in the caption of the complaint.

assistant manager in charge of cashiers, approached Fay about one of his cashiers, Terri L. Byrd. Byrd, a seasonal employee hired on November 14, 1992, had performed in an exemplary manner. Because she was an asset to Sam's Club, West wanted her to be a permanent associate. On or about January 4, 1993, West asked Fay to "park" Byrd in the demo department until the manager, Gardner, could find a permanent position for Byrd. Fay accommodated West's request, and scheduled Byrd for hours in the demo department. Byrd was transferred to the demo department on January 4, 1993.

Shortly after Byrd started work in the demo department, Sam's Club's vendors requested more demo hours than anticipated. Because of the unexpected increase in vendor demand, Byrd remained in the demo department until May 22, 1993, when Fay promoted her to the membership department.

## **II. Procedural History**

On January 11, 1994, Plaintiff filed this suit against Sam's Club, alleging that the Sam's Club (1) fired Plaintiff because of her race in violation of 42 U.S.C. § 2000e and 42 U.S.C. § 1981(a); (2) discriminated against Plaintiff and other blacks in hiring, promotion, and termination in violation of 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981(a); and (3) discriminated against Plaintiff by applying personnel policies in a discriminatory manner in violation of 42 U.S.C. § 2000e and 42 U.S.C. § 1981(a).

Defendants moved for summary judgment on July 8, 1994. The matter was referred to the Magistrate Judge pursuant to 28 U.S.C. § 636 and Local Rule 19.02(B)(2), DSC. The Magistrate Judge filed his Report and Recommendation on October 31, 1994. In the Report and Recommendation the Magistrate Judge recommended that "Defendant's motion

for summary judgment on all Plaintiff's causes of action be granted." On November 23, 1994, Plaintiff filed objections to the Report and Recommendation of the Magistrate Judge. Sam's Club filed a response to Plaintiff's objections on December 1, 1994. This matter is now before the court for review of the Report and Recommendation pursuant to 28 U.S.C. § 636.

### **III. STANDARD OF REVIEW**

The applicable standard of review is clear. A magistrate judge makes a recommendation to the court, to which any party may file written objections. 28 U.S.C. 636(b)(1)(B)-(C). The court is not bound by the recommendation of a magistrate judge but, instead, retains responsibility for the final determination. Mathews v. Weber, 423 U.S. 261, 271, 96 S.Ct. 549, 554 (1976). The court is required to make a de novo determination of those portions of the report or specified findings or recommendation as to which an objection is made. 28 U.S.C. 636(b)(1)(C). The court, however, is not required to review, under a de novo or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the report and recommendation to which no objections are addressed. Thomas v. Arn, 474 U.S. 140, 150, 106 S.Ct. 466, 472 (1985). While the level of scrutiny entailed by the court's review of the Report will depend on whether or not objections have been filed, in either case the court is free, after review, to accept, reject, or modify any of the findings or recommendations of the magistrate judge. Wood v. Schweiker, 537 F.Supp. 660, 661 (D.S.C. 1982).

### **IV. SUMMARY JUDGMENT STANDARD**

In deciding a summary judgment motion, the court must look beyond the pleadings

and determine whether there is a genuine need for trial. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-53 (1986). If Defendant carries its burden of showing there is an absence of evidence to support a claim, then Plaintiff must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324-25 (1986). An issue of fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for Plaintiff. Anderson, 477 U.S. at 248. An issue of fact concerns "material" facts only if establishment of the fact might affect the outcome of the lawsuit under governing substantive law. Id. A complete failure of proof concerning an essential element of Plaintiff's case necessarily renders all other facts immaterial. Celotex, 477 U.S. at 322-23. Moreover, production of a "mere scintilla of evidence" in support of an essential element will not forestall summary judgment. Anderson, 477 U.S. at 251.

In other words, summary judgment should be granted in those cases in which it is perfectly clear that no genuine issue of material fact remains unresolved and inquiry into the facts is unnecessary to clarify the application of the law. McKinney v. Bd. of Trustees, 955 F.2d 924, 928 (4th Cir. 1992); Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir.1979).

With these standards in mind, the court now focuses its attention on whether summary judgment is appropriate for the specific causes of action in this case.

#### **IV. DISCUSSION: Title VII & Section 1981 Race Discrimination**

With regard to all three of Plaintiff's causes of action, Plaintiff alleges that Defendant violated 42 U.S.C. § 2000e-2 and 42 U.S.C. § 1981(a). 42 U.S.C. § 2000e-2(a), Title VII of the 1964 Civil Rights Act, provides that

- (a) It shall be an unlawful employment practice for an employer --
  - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; .....

42 U.S.C. § 1981(a) provides that

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

In Patterson v. McLean Credit Union, 491 U.S. 164, 109 S.Ct. 2363 (1989), the Supreme Court reaffirmed that the framework of proof adopted for Title VII cases is equally applicable to § 1981 claims. Therefore, both the Title VII and the § 1981 claims will be examined using the same analytical framework.

The Supreme Court has established a now-familiar scheme for resolving employment discrimination cases under Title VII. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). In the first stage of this burden-shifting scheme, Plaintiff must prove, by a preponderance of the evidence, a prima facie case of discrimination. Upon proof of a prima facie case, a rebuttable presumption that Defendant unlawfully discriminated

against Plaintiff arises, Burdine, 450 U.S. at 252-54, and the burden of production shifts to Defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. Id. at 253. Should Defendant carry this burden, the prima facie case is rebutted, and Plaintiff must then “prove by a preponderance of the evidence that the legitimate reasons offered by Defendant were not its true reasons, but were a pretext for discrimination.” Id. This burden merges with Plaintiff's ultimate burden of persuading the trier of fact that he was the victim of intentional discrimination.

In St. Mary's Honor Center v. Hicks, \_\_\_ U.S. \_\_\_, 113 S.Ct. 2742 (1993), the Court reaffirmed the three step analytical framework to be applied in Title VII "disparate treatment" claims. The Supreme Court reaffirmed the holding of McDonnell Douglas and Burdine, emphasizing that Defendant bears the burden of production, and that the "Title VII plaintiff at all times bears the ultimate burden of persuasion." St. Mary's Honor Center, 113 S.Ct. at 2749 (emphasis added).

Summary judgment in favor of a Title VII defendant may be appropriate at either the first or third stages of the analysis if Plaintiff fails to offer sufficient evidence to meet her burdens. Ballinger v. North Carolina Agric. Extension Serv., 815 F.2d 1001, 1005-06 (4th Cir.), cert. denied, 484 U.S. 897 (1987) (failure to establish prima facie case); Int'l Woodworkers of America v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1271 (4th Cir. 1981) (failure to produce evidence countering employer's articulated legitimate reason for disparate treatment). Plaintiff's case fails in both regards.

To meet the four-part test first articulated in McDonnell Douglas Corp., Plaintiff must show: (1) she is a member of a protected class; (2) she was qualified for her job and



her job performance was satisfactory; (3) in spite of her qualifications and performance, she was fired; and (4) the position remained open to similarly qualified applicants after her dismissal. Williams v. Cerberonics, Inc., 871 F.2d 452, 455 (4th Cir. 1989).

Plaintiff meets the first requirement of a prima facie case: she is a member of a protected class. However, Plaintiff fails to meet the second and third requirements.

With regard to the second requirement, Plaintiff "s performance was average, at best, and she had received a verbal "coaching" or warning about her performance.

According to her last evaluation:

[Plaintiff] has average initiative. She performs as expected but could be more aggressive ... could do more to promote several product features ... could put more effort into speed of set-up and breakdown ... she can, at times, be perceived as negative or short to other partners ... could do more to keep her area clean and organized....

Plaintiff's performance was poor relative to other associates in the demo department.

With regard to the third requirement, Plaintiff cannot show that she was fired in spite of her qualifications and performance. Plaintiff was terminated along with twelve other part-time associates. All these associates were chosen for termination based on their performance relative to the other associates in their respective areas. The undisputed evidence shows that Defendant chose Plaintiff for termination because of, not in spite of, her performance.

Furthermore, even if Plaintiff established a prima facie case, Defendant has provided a legitimate, nondiscriminatory reason for her termination. Defendant terminated twelve part-time associates, ten whites and two blacks, including Plaintiff, in late December 1992, in anticipation of a post-Christmas season business slow down.

Defendant followed its normal procedures in selecting associates to be terminated. After deciding that it was necessary to reduce the overall work force by a total of twelve part-time associates, Gardner decided to terminate three employees from the demo department based upon the recommendations of his assistant manager in the demo department, Fay. Fay recommended Plaintiff, Owen and Soller be terminated as part of the overall seasonal reduction in the store work force.

When a defendant has moved for summary judgment and has rebutted plaintiff's prima facie case, to survive summary judgment, a plaintiff must come forward with specific facts either directly evidencing a discriminatory motive or showing that the employer's explanation is not credible. In re-examining Plaintiff's prima facie case, and Plaintiff's efforts to show that Defendant's reason was a pretext, the court must look at the record as a whole, rather than seizing upon a particular piece of evidence contained within it. Cook v. CSX Transportation Corporation, 988 F.2d 507, 512 (4th Cir. 1993). A plaintiff must point to specific facts supporting intentional discrimination. Supposition and conjecture are inadequate and will not support plaintiff's case. "[A] plaintiff's own assertions of discrimination in and of themselves are insufficient to counter substantial evidence of legitimate nondiscriminatory reasons for an adverse employment action." Williams v. Cerberonics, Inc., 871 F.2d 452, at 456 (4th Cir. 1989).

Plaintiff alleges that "the reasons given by Defendant for firing the Plaintiff was [sic] just a pretext to discriminatorily fire the Plaintiff solely or in part of his [sic] race .... " Plaintiff's Second Amended Complaint, at ¶ 6. Plaintiff alleges that Defendant fired her so that it could give her job to a white part-time cashier. Plaintiff's Complaint, at ¶ 5.

Plaintiff, however, has offered no substantive, admissible evidence in support of these allegations. In her deposition, Plaintiff admitted that she did not know how the decision was made to choose the three individuals, one black and two whites, who were terminated in late December. Moreover, she concedes that Defendant had the right to make this decision based on performance. Plaintiff's Dep. at 40-41.

Plaintiff's real complaints are that the terminations in December 1992 were not based on seniority and her belief that she had developed a personality conflict with her immediate supervisor which may have influenced the decision to terminate her. Plaintiff's Dep at 42-43, 47-51. These complaints do not support a finding of racial discrimination. Plaintiff has presented no substantive, admissible evidence that Defendant's decision to terminate her was based on race.

The uncontroverted evidence is that Defendant decided to reduce its work force after the Christmas season and decided to terminate those associates with relatively poor performances. In the demo department, where Plaintiff worked, this resulted in a reduction of three part-time associates. Of these three, one was black and two were white. Two other black women remained in the demo department after these three terminations.

In Glover v. Lockheed Corporation, 772 F.Supp. 898, 902 (D.S.C. 1991) (Norton,J.), another judge of this district confronted an employer's decision to not use seniority in a reduction in force case:

In sum, plaintiff simply has no case. This was an unfortunate situation for both Mr. Glover and Lockheed, which had to surplus in excess of four hundred employees. In doing so, it followed established procedures for determining who stayed, who left, and who was transferred or demoted. That procedure did not place a great emphasis on seniority. Although this might appear to be an unfair decision, it is a business decision which does

not violate the provisions of Title VII. Title VII protects against the discrimination by an employer against a person based on his race, age or sex. It does not protect against an employer whose policies might seem unjust or shrewd from a business sense. Although the plaintiff may feel he was treated unfairly, he has not shown that he was discriminated against, and therefore has failed to make out a Title VII claim.

Title VII does not "require an employer to adopt a life of economic altruism and thereby immunize protected class members from discharge or demotion despite their poor performance." Gariola v. Commonwealth of Virginia Department of General Services, 753 F.2d 1281, 1287 (4th Cir. 1985). Accordingly, summary judgment in favor of Defendant is appropriate.<sup>4</sup>

Plaintiff has filed objections to the Report and Recommendation. The court finds these objections to be without merit.<sup>5</sup>

Plaintiff's first objection is that the Magistrate Judge incorrectly found that (1) Plaintiff was not one of the highest rated employees in the demo department and (2) Plaintiff's work performance was below that of Martha Sollers, one of the two white

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<sup>4</sup>Plaintiff's second and third causes of action contain conclusory allegations regarding Defendant's alleged discrimination against blacks in hiring, promoting, terminating and personnel policies. Plaintiff alleges no facts to support her second and third causes of action separate from the allegations supporting her first cause of action. Nor has she come forward with any "facts" separate from those "facts" supporting her first cause of action. These conclusory allegations, with no factual support, cannot defeat the motion for summary judgment. To the extent any of the "facts" surrounding Plaintiff's first cause of action support her second and third causes of action, the court's analysis applies equally to the second and third causes of action and the court determines Defendant's motion for summary judgment is appropriate as to Plaintiff's entire complaint.

<sup>5</sup>Plaintiff filed a twenty-one page document that largely reiterated the arguments she made in opposition to the summary judgment. The court, however, only addresses those arguments that specifically challenge certain portions of the Report and Recommendation of the Magistrate Judge.

women terminated in December 1992 from the demo department. The court has reviewed the December evaluations of Plaintiff and other employees, including Ms. Sollers, and finds that the Magistrate Judge did not err in concluding that Plaintiff was not one of the highest rated employees in the demo department. Furthermore, it appears that both Plaintiff and Sollers were not performing as well as most other employees in the demo department.<sup>6</sup>

Plaintiff's next objection is that the Magistrate judge erred in determining that Plaintiff's December 1992 evaluation was not altered. Plaintiff contends that portions of the handwritten evaluation were added later. Plaintiff has no factual support for this contention.

On a related matter, Plaintiff contends that Sam's Club transferred Mr. Fay out of state to prevent him from giving a deposition relating to the December 1992 evaluation and other matters. This argument is without merit. First, Mr. Fay moved to Tennessee before Plaintiff's counsel gave notice of his intent to depose Mr. Fay. Second, there is no evidence to support Plaintiff's contention that Mr. Fay was forced to move in order to prevent his deposition.

Plaintiff's next objection is that the Magistrate Judge erred in finding no connection between the decision to transfer Terri Byrd to the demo department and Plaintiff's termination. The court finds this objection to be without merit. The evidence shows that Byrd had performed in an exemplary manner and that Sam's Club wanted her to be a

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<sup>6</sup>It is immaterial which of these two employees was a better worker since both were performing at a level below most of the other employees in the department.

permanent associate. The fact that this was accomplished by transferring her to the demo department after Plaintiff's termination provides no support for Plaintiff's case.

Finally, Plaintiff objects to the Magistrate Judge's conclusion that Plaintiff's arguments are based on conjecture and speculation. The court has reviewed Plaintiff's deposition and affidavits and agrees that Plaintiff's case is based almost completely upon her mistaken beliefs as to her job performance. Her belief that she was a valued employee is not evidence to support a claim for racial discrimination.

#### V. Conclusion

For these reasons, the court accepts the recommendation of the Magistrate Judge that summary judgment be granted in favor of Defendant. The Clerk is ordered to enter judgment for Defendant Sam's Club.

IT IS SO ORDERED.

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CAMERON MCGOWAN CURRIE  
UNITED STATES DISTRICT JUDGE

May \_\_\_, 1995

Florence, South Carolina